IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 14, 2007 Session

STATE OF TENNESSEE v. JUNIOR DALE ANDERSON

Direct Appeal from the Criminal Court for Wilson County
Nos. 05-0917, 05-0918 J. O. Bond, Judge

No. M2007-00828-CCA-R3-CD - Filed August 12, 2008

Junior Dale Anderson, the defendant, was convicted of attempted voluntary manslaughter (Class D felony), two counts of aggravated assault (Class C felony), reckless endangerment (Class A misdemeanor), and domestic assault (Class A misdemeanor). The defendant received an effective sentence of sixteen years. On appeal, the defendant alleges: (1) the evidence was insufficient to support the conviction for attempted voluntary manslaughter; (2) the trial court erred in excluding from evidence the defendant's recorded call to 9-1-1; (3) the trial court erred in certain jury instructions during trial; (4) the trial court erred in its failure to merge the offenses of attempted voluntary manslaughter and aggravated assault; and (5) the trial court erred in imposing an excessive sentence. After review, we conclude that the exclusion from evidence of the defendant's call to 9-1-1 was reversible error and remand the cause for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed and Remanded for New Trial

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Adam W. Parrish, Lebanon, Tennessee, for the appellant, Junior Dale Anderson.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Jason L. Lawson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Wilson County Sheriff's Department's involvement in this case began with a call from Jesse Braswell, the defendant's sister. Her call was made to the Wilson County 9-1-1 dispatcher at 7:42 p.m. on April 19, 2005. Ms. Braswell reported that she had talked to the defendant by telephone and that the defendant was "wild" and threatening to kill his wife and son. She said the defendant was a hunter and kept guns in his residence. Ms. Braswell gave directions to the

defendant's house and urged them to "Have the law go in there. Get the kids out. He will kill them." The record does not reflect where Ms. Braswell was located, but it was apparently not in the vicinity of the defendant's residence. Two deputies in separate patrol cars were dispatched first to the scene.

Earlier that day, the defendant's wife, Cheryl Anderson, returned home from work and observed the apparently intoxicated defendant lying in the driveway. After she told the defendant to go in the house, he arose and went first to his bedroom. After ten or fifteen minutes, the defendant came out to the living room and asked Mrs. Anderson where their son, Nathan, was. Mrs. Anderson said that "she smarted off," and the defendant drew back his hand in an attempt to hit her. She kicked the defendant and evaded him, then instructed Nathan to go outside. She and Nathan went to their next door neighbor's house. She said she did not fear the defendant as he was laughing when she and Nathan left. Mrs. Anderson made an application for an Order of Protection on the next day. She said that she did so on the advice of a representative of the District Attorney's office, her lawyer, and family members.

Mrs. Anderson stated that she did not call for police assistance or to 9-1-1. She had called their friend, Jackie Langford, to come and help them resolve their problems. While at the neighbor's house, Mrs. Anderson saw a sheriff's patrol car park in her driveway. She saw an officer get out of the car, go behind it, and draw his gun. Mrs. Anderson went to the officer and identified herself. The officer instructed her to go back to the neighbor's residence. Later, another officer dressed in "SWAT clothes" talked to Mrs. Anderson. She told him the defendant was the only person in their residence. She heard multiple shots, "more than five, maybe ten," that she described as having a high pitched sound. Later, she heard a single shot of a lower pitch sound. Mrs. Anderson was removed by officers to a house further from their residence. She observed six or eight police vehicles present and heard at least one helicopter. Mrs. Anderson stated that, at the time, she feared the officers were going to kill the defendant. The defendant and Mrs. Anderson were residing together as husband and wife at the time of his trial.

Lieutenant Lance Howell of the Wilson County Sheriff's Department was custodian of the recordings maintained of phone calls to the Department, as well as calls to 9-1-1, radio traffic, and the dispatcher. Lieutenant Howell played several redacted recorded conversations that occurred on April 19. The first was a 9-1-1 call received at 7:42 p.m. from the defendant's sister, Jesse Braswell. Ms. Braswell reported that the defendant ". . . was fixing to kill his wife and son. He is wild." She could not provide the defendant's specific address but gave general directions to his residence. She stated that the defendant was threatening to kill his wife and child and that the defendant was a hunter and had guns in the residence. This information was relayed by dispatch to Sheriff's personnel in their vehicles. During this conversation, the 9-1-1 operator talked with the defendant by telephone. These redacted 9-1-1 tapes, but not the defendant's first call to 9-1-1, were played for the jury.

The following recordings were played:

At 8:29 p.m., a radio transmission was made by one of the officers on the scene that the defendant fired a shot from the back window.

At 8:49 p.m., another radio transmission from an officer on the scene announced that shots were fired and asked for support to respond to the scene.

At 8:50 p.m., a radio transmission announced a shot had been fired at car 251 on the scene and shots had been exchanged. Car 1, the sheriff's unit, radioed to cease fire.

At 8:51 p.m., in a radio transmission, units at the scene were told to pull back. A respondent said that the defendant had a high-powered rifle and that the deputies were taking cover as best they could.

On cross-examination, Lieutenant Howell said there was one recorded call from the defendant's residence at 8:26 p.m. to 9-1-1.

Deputy Lee Bridges stated that he arrived at the defendant's residence at 7:47 p.m. in response to a dispatch reporting that the defendant was threatening his wife and son. He parked his patrol car just off the roadway in front of the defendant's residence. The defendant's wife came to him from a neighbor's house and identified herself. Deputy Bridges ordered her to return to the neighbor's residence. Shortly thereafter, he went to Mrs. Anderson and learned that the defendant was alone in the residence and that Mrs. Anderson and her son were safe at the neighbor's house. Deputy Bridges returned to his position behind his patrol car, armed with his Glock .40 caliber handgun. He used his public announcement system to command the defendant to come outside. Sergeant Burns had arrived in the interim and parked his car at the rear of the defendant's residence. The defendant came to the door and told the officers to get off his property.

Sergeant Burns crept to a privacy fence behind the defendant's residence. Deputy Bridges heard Sergeant Burns order the defendant to put his hands up, then shouted that the defendant had a gun. The defendant came to the door a third time and warned the officers he would start shooting if they did not leave his property. Deputy Bridges heard a shot fired from the rear of the defendant's house and thought it sounded like a rifle. Later, he saw a rifle projecting from a side window of the residence, then saw a muzzle flash and debris fly up in front of Deputy Bridges' car. Deputy Bridges fired five or six rounds back toward the defendant. He saw another muzzle flash and began firing again. Deputy Bridges shot a total of sixteen rounds at the defendant's residence. During this time, he saw another muzzle flash from the defendant's weapon. Deputy Bridges remained behind his vehicle until approximately midnight, when he was relieved by the Special Response Team (SRT), the equivalent of what is commonly known as SWAT.

Sergeant Jason Burns was the second officer to arrive at the defendant's residence. He went to the rear of the residence and snuck behind a privacy fence carrying a flashlight and a shotgun. He saw the defendant standing in a door, aimed his light and shotgun at him, and ordered him to raise his hands. Sergeant Burns said the defendant held in his hand a rifle equipped with a telescopic sight. The defendant was startled by Sergeant Burns and went back inside the house. Sergeant Burns

heard Deputy Bridges' repeated commands and heard the defendant repeatedly order the officers off his property.

Sergeant Burns went back to his patrol car and, from that position, saw a muzzle flash from a back window of the residence. Deputy Mike Long joined Sergeant Burns behind Burn's car. Sergeant Burns saw another muzzle flash and then heard Deputy Bridges returning the fire. Sergeant Burns stated that his patrol car was never hit by any shots fired.

Deputy Mike Long testified that he was the third officer to arrive at the scene. He responded to a dispatch which described a domestic assault with "suicidal and homicidal threats." Deputy Long pulled his car near Sergeant Burns' vehicle. Sergeant Burns informed Long that the defendant had a rifle with a scope. Long took a position with Burns behind a patrol car. Deputy Long heard the exchanges of Deputy Bridges' commands that the defendant to come outside and the defendant's demands that the officers leave. He also heard the defendant state he would start shooting if the officers did not vacate the defendant's property. Deputy Long saw a muzzle flash from the rear of the defendant's residence. He later heard another shot from the residence and saw Deputy Bridges shooting at the residence. Deputy Long heard a third shot from the residence.

During cross-examination, Deputy Long stated that he was on the scene all night until the defendant was taken and booked at 5:09 a.m. on an "investigative hold." He reiterated that he heard approximately three shots fired by the defendant and did not know how many ammunition rounds or tear gas canisters were fired at the residence.

Sergeant Barbara McNabb testified that she acted as a negotiator during this incident. She stated that she spoke with the defendant approximately three times during the night. The first two were recorded, and the third, placed from her cell phone, was not. The first two conversations, at 7:48 p.m. and 7:55 p.m. respectively, were played for the jury. In the first conversation, the defendant told Sergeant McNabb that his wife and child were not there and that he had no intent of hurting himself or others. He admitted having hunting weapons locked in his gun cabinet. When told that officers were coming to speak with him, the defendant said he would not let them in.

During the second call, he admitted to drinking "a little" that day. He again gave assurances that his weapons were locked away. The defendant stated that he would shoot any officers who tried to break his door down. The defendant also stated he was in bed and was going to sleep.

Sergeant McNabb kept notes during her negotiation attempts and later reconstructed a typewritten log which was a combination of her and Officer Hibbett's notes from the night of the incident. The log reflected that the defendant fired the first shot at 8:27 p.m. She had her third conversation with the defendant after this shot and asked him why he was shooting. He said the officers had sneaked up on him behind the fence and that he would kill someone before they killed him.

At 9:12 p.m., the Sheriff arrived on the scene and advised dispatch that he had spoken with the defendant and that the defendant had agreed to come out. However, repeated attempts to call the defendant after 9:22 p.m. went unanswered. At 2:00 a.m. the next day, gas canisters were shot into the defendant's residence. Several more gas canisters were deployed into the residence until 4:19 a.m. The SRT's entry team entered the residence at 5:07 a.m., and the defendant was taken into custody. Sergeant McNabb stated on cross-examination that the defendant made no suicidal or homicidal threats during her conversations with him.

Detective Sergeant Jeff Johnson testified that he investigated the crime scene after the incident was over. Initially, Mrs. Anderson gave consent for a search, then revoked her consent. A search warrant was then obtained. In the course of the investigation, a spent projectile was found in a divot in the vicinity of the front of Sergeant Bridges' car. Inside the residence, a spent shell casing was found in a rear bedroom. In a bedroom, five unloaded long guns and three live .270 caliber rounds were found under the bed. The spent casings expelled from Deputy Bridges' weapon were forty-five feet from the location of the divot in front of Bridges' car, which indicated Deputy Bridges' position when firing at the defendant.

Special Agent Teri Arney testified as an expert on firearms. Agent Arney examined the defendant's Winchester .270 caliber rifle, as well as two fired cartridge cases and a spent bullet fragment. She determined that the cartridges and bullet were fired from the defendant's Winchester. She also identified the jacket fragment found in Deputy Bridges' car grille as being a part of the same bullet fragment previously identified.

After the State rested, the defendant called Sharon Tackett, a dispatcher who was on duty at Wilson County Sheriff's Office on April 19. A recorded conversation with the defendant was played as an offer of proof after the trial court ruled the conversation inadmissible.

Lieutenant Detective Ricky Knight testified that he processed the defendant's residence after the defendant was taken into custody. He stated that the investigation was difficult due to the heavy presence of teargas in the house. He found four unloaded hunting guns under a bed. There were fired cartridge casings found in the residence. Only one spent projectile, the fragment in the divot, was found during the investigation.

Jackie Langford testified that he was called by the defendant's wife to come and assist her in removing the defendant from his prone position in the driveway. Mr. Langford lived in Clay County, and it took an hour and twenty minutes to make the trip. He was called back by Mrs. Anderson and told that the defendant was in their house and in bed; however, she asked him to proceed to the house. Mr. Langford had served as a deputy sheriff, dispatcher, county commissioner, and assistant judicial commissioner in Clay County. When Mr. Langford reached the defendant's neighborhood, he was blocked from proceeding by a heavy presence of law officers. Mr. Langford informed an officer that he was a friend of the defendant's, and he was directed to pull his vehicle to a nearby store. He could overhear officers discussing the incident and radio traffic concerning the situation. The defendant called Mr. Langford, and Mr. Langford advised the defendant, based on

what he had heard, that the officers were "hot" and "they're going to kill you." He advised the defendant, if the officers came to the house, to not touch a gun and to get "spread eagle" on the floor. Mr. Langford advised the "Chief of Emergency" on the scene that he was in phone contact with the defendant and offered to go and remove the defendant from the house. Mr. Langford was never allowed to go to the scene. He later advised the defendant not to come out until daylight. Mr. Langford stated that the defendant was very scared and was convinced that the officers intended to kill him.

Analysis

The defendant's first issue challenges the sufficiency of the evidence to convict the defendant of attempted voluntary manslaughter. The verdict was a finding of guilt of a lesser included offense of the indicted charge of attempted second degree murder of Deputy Bridges.

When the sufficiency of the evidence is challenged on appeal, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992); Tenn. R. App. P. 13(e). The same standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *See State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 47 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that, on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *See State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner. T.C.A. § 39-12-211.

Attempt is defined as follows:

(a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
    (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

(b) Conduct does not constitute a substantial step under subdivision (a)(3), unless the person's entire course of action is corroborative of the intent to commit the offense.

T.C.A. § 39-12-101(a), (b).

The defendant essentially frames his argument on this issue in factual terms. He argues that the defendant was a good marksman, using a deer rifle equipped with a scope, and could have hit Deputy Bridges or at least his patrol car, had he attempted to do so. As appealing as the argument is, it ignores the testimony that the defendant was inebriated at the time. There was testimony of two shots from a high-powered rifle by the defendant in the direction of Bridges. The jury settled this issue by its finding of guilt. The defendant's actions met the elements of attempted voluntary manslaughter and, for our review purposes, justifies the jury's verdict. We conclude that the evidence was sufficient to convict the defendant.

Exclusion of Defendant's Evidence

Next, the defendant contends that the trial court erred in excluding from evidence a call made by the defendant to the 9-1-1 dispatcher. In the call, the defendant warned that, if the officers did not get off his property, he was "fixing to hurt somebody." When asked by the dispatcher why he would not step outside and speak with the officers, the defendant responded that "one of the damned sheriffs" had told him they were going to kill him. The call was made by the defendant at 8:19 p.m., prior to any shots being fired. At that time, at least two deputies, in separate cars, were positioned in front and behind the defendant's residence.

On appeal, as at trial, the defendant argues that the statements made in the 9-1-1 call were excited utterances, thereby qualifying as an exception to the hearsay ban. He stressed that self defense against excessive police force was central to his defense and that the conversation was relevant to that defense. The trial court refused to admit the conversation, without actually listening to the recording, and held as follows:

Trial Court: I don't believe its an exception. I don't think its an excited utterance. I don't think its either one.

. . . .

Trial Court: I understand what you're saying is what you were going to prove, what is says, and based on that, that's not admissible. There's no

> reason for me to play it when you're saying what is says. Anything else? Were you going to ask her anything other than that?

The admission of evidence at trial is entrusted to the broad discretion of the trial court, and, as such, a trial court's ruling on the admission of evidence may only be disturbed upon a showing of an abuse of that discretion. *State v. Young,* 196 S.W.3d 85, 105 (Tenn. 2006); *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004) (citing *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)). The trial court's exercise of discretion may not be reversed unless the court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

Generally, out of court statements introduced to prove the truth of the matter asserted are inadmissible as hearsay. Tenn. R. Evid. 801, 802. The excited utterance exception allows hearsay to be admitted when the statement is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tenn. R. Evid. 803(2). The Tennessee Supreme Court has quoted the rationale for admitting such statements as follows:

> First, since this exception applies to statements where it is likely there was a lack of reflection-and potential fabrication-by a declarant who spontaneously exclaims a statement in response to an exciting event, there is little likelihood, in theory at least, of insincerity. . . . Second, ordinarily the statement is made while the memory of the event is still fresh in the declarant's mind. This means that the out-of-court statement about an event may be more accurate than a much later in-court description of it.

State v. Gordon, 952 S.W.2d 817, 819-20 (Tenn. 1997) (quoting Cohen, Paine & Sheppeard, Tennessee Law of Evidence, § 803(2).1 at 532 (3d ed. 1995)). Thus, the following requirements are needed: (1) "there must be a startling event or condition;" (2) "the statement [must] 'relate to' the startling event or condition;" and (3) "the statement [must] be made while the declarant is under the stress or excitement from the event or condition." *Id.* at 820. "[T]he ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." *Id.* (quoting *State v. Smith,* 857 S.W.2d 1, 9 (Tenn.), *cert. denied,* 510 U.S. 996, 114 S. Ct. 561 (1993)). We are to consider the time interval between the event and the statement "and the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant, including such characteristics as age and physical or mental condition; and the contents of the statement itself, which may indicate the presence or absence of stress." *Id.*

The record indicates that at the time the deputies arrived, the defendant was alone in his home and all the weapons were properly stored. At the time this call was placed, the defendant knew that his house was surrounded by armed deputies, with searchlights focused on his home, demanding that he exit his domicile. Moreover, it is worthy of note that, although unknown to the defendant, there were two teams of snipers in position, their crosshairs focused on the defendant's home, as well as a helicopter hovering overhead and a phalanx of officers in reserve. The recorded conversation

clearly reflects that the defendant believed that his life was in danger at that moment, a rational belief given the circumstances. Logic dictates that this sequence of events falls within the definition of a "startling event." Likewise, it appears undisputed that the statements made in the call "related to" the startling event in question, especially in light of the fact that "considerable leeway is available" with regard to this factor as the statement "may describe all or part of the event or condition, or deal with the effect or impact of that event or condition." Cohen, Paine & Sheppeard, Tennessee Law of Evidence, § 803(2).2 at 534. Finally, it also appears that the record more than establishes that the defendant was still under the stress or excitement from the event or condition when the statements were made. The armed deputies were still present when the call was made; thus, the event was ongoing.

The recorded conversation was manifestly relevant in that it was made prior to any gunfire from the defendant. Moreover, we note that all other recorded conversations between the defendant and the 9-1-1 dispatcher (all were supportive of the prosecutions's theory) were played for the jury. It appears that this call was critical to the jury's understanding of what transpired between the defendant and law enforcement prior to the shooting. Because the record establishes that the statement was an excited utterance, we must conclude that the trial court abused its discretion in failing to allow the admission of the taped call. Moreover, we conclude that the error was of such magnitude as to warrant reversal and remand for a new trial.

Jury Instruction

In his next issue, the defendant alleges that the trial court erred in instructing the jury that the law enforcement officers had a right, as a matter of law, to be on the defendant's property. The defendant contends that this conclusion should have been reserved for determination by the jury as the trier of fact. However, the defendant waived any objection to this instruction. During a conference between counsel and the trial court on jury instructions, the following colloquy occurred:

> Trial Court: And I'm also going to tell them that the law enforcement officer had the right as a matter of law to be on the property of Mr. and Mrs. Anderson on the date and time in question to investigate an alleged criminal wrong or attempted criminal wrong towards an occupant of that property and that the officers were not trespassers on this property.
>
> Defense Counsel: That's fine, too, Your Honor.

The Tennessee Rule of Appellate Procedure 36(a) provides that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."

Furthermore, the defendant's motion for a new trial did not raise this issue for the trial court's consideration. Tennessee Rule of Appellate Procedure 3(e) states in pertinent part:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused,

misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

We conclude that the defendant not only enabled the alleged error but also failed to alert the trial court for its review on the motion for new trial and has waived the issue for appellate review.

Lesser Included Offenses and Sentencing

We quote verbatim the defendant's last issue from his brief:

V. Whether the trial court committed reversible error by instructing that the offenses of "Attempted Voluntary Manslaughter" and "Aggravated Assault," even to the same victim are not a lesser included offense of the other and by subsequently ordered that they be served consecutively to each other.

We interpret this as two separate issues: a challenge to the jury instructions and, secondly, as an objection to the imposition of consecutive sentences as to the convictions in counts one and three of Docket No. 05-917, involving Deputy Bridges.

The State argues that the defendant has waived the jury instruction issue in multiple respects. First, from our review of the record, there were no such instructions given. Second, the record reflects that no written request or objection concerning lesser included offenses was filed by the defendant, a necessary prerequisite for appellate review under Tennessee Code Annotated section 40-18-110(c).

The defendant's failure to request lesser included instructions or to object was a waiver of the issue, pursuant to Tennessee Rule of Appellate Procedure 36(a), as well as omitting to include the issue on the motion for new trial as required by Tennessee Rule of Appellate Procedure 3(e). Accordingly, we conclude the issue was effectively waived.

Consecutive Sentencing

Before imposing a sentence upon a convicted criminal defendant, a trial court must consider: (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and -114; and (f) any statement the defendant wishes to make in his or her own behalf about sentencing. *See* T.C.A. § 40-35-210(b); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court must record the reasoning involved in imposing the specific sentence, identify which enhancement and mitigating factors apply and the facts supporting them,

and articulate the method by which the mitigating and enhancement factors have been evaluated and balanced in calculating the sentence. *See State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, the appellate court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See T.C.A. § 40-35-401(d). This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If, upon review, the record reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable and the appellate court may not modify the sentence even if it would prefer a different result. *See State v. Pike*, 978 S.W.2d 904, 926-27 (Tenn. 1998). The appellate court should uphold the original sentence if (1) it complies with the purposes and principles of the 1989 Sentencing Act, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. *See* T.C.A. § 40-35-401 Sentencing Commission Comments; *Arnett*, 49 S.W.3d at 257.

Pursuant to statute, consecutive sentences may be ordered if the trial judge finds by a preponderance of the evidence that:

(1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
(2) The defendant is an offender whose record of criminal activity is extensive;
(3) The defendant is a dangerous mentally abnormal person . . .;
(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor . . .;
(6) The defendant is sentenced for an offense committed while on probation; or
(7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b). "Whether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." *State v. Hastings*, 25 S.W.3d 178, 181 (Tenn. Crim. App. 1999). "However, before ordering the defendant to serve consecutive sentences on the basis that he is a dangerous offender, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes, necessary to protect the public against further criminal conduct, and in accord with the general sentencing principles." *State v. Imfeld*, 70 S.W.3d 698, 708-09 (Tenn. 2002).

The trial court determined that the defendant was a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4). The trial court reasoned to this conclusion by noting the shots fired by the defendant in the officers' respective areas. The trial court also found the

consecutive sentences necessary to protect the general public and that the sentence was related to the severity of the offenses. Accordingly, we conclude that the imposition of consecutive sentences was not an abuse of the trial court's discretion.

Conclusion

Having concluded that the exclusion of the defendant's phone conversation with the 9-1-1 dispatcher was reversible error, we remand the case for a new trial.

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JOHN EVERETT WILLIAMS, JUDGE